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No. 90-1298

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

AMER AL-ZUBAIDI,

Petitioner,

v.

M. A. IJAZ, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE WRIT

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1. THERE IS NO CONSTITUTIONAL QUESTION.

This appeal does not present for review any issue of law, let alone a

question of sufficient magnitude and national importance for review by the United States Supreme Court. This appeal challenges the sufficiency of the evidence upon which the trial court set aside the jury verdict. The United States Fourth Circuit Court of Appeals affirmed that decision.

Petitioner focuses only on the evidence he presented at trial regarding his oral presentation to his thesis committee. Both the trial court and the appellate court considered Petitioner's entire evidentiary record of six years of ineptness and failure, and properly applied the "but for" standard set by this Court in Mount Healthy City Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed. 2d 471 (1977) and

Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). Indeed, as the Fourth Circuit Court of Appeals stated, "These poor reviews were not the result of any antagonism by Ijaz. We agree that if Ijaz sought to sink Al-Zubaidi, then Ijaz was attempting to sink a ship that already was sinking. Indeed, the record indicates that the graduate committee's decision to recommend the termination of Al-Zubaidi was based on Al-Zubaidi's entire file, not just on the presentation made to the Ph.D. committee. It also indicates that Dr. Gilmer attempted to gather a sample of opinion on Al-Zubaidi outside of his final Ph.D. committee before proceeding with the termination. Thus, the

decision to terminate Al-Zubaidi was not based only on the Ph.D. committee presentation. Despite his success in the classroom, Al-Zubaidi had simply failed as a researcher." Petitioner now urges this Court to ignore the evidence of his six years of experimental research failure and to narrowly focus on an isolated incident as determinative of the decision to dismiss him from the Graduate Program in Nuclear Physics at Virginia Polytechnic Institute and State University. Petitioner's actual argument is that there is insufficient evidence to support the trial court's setting aside the jury verdict, a decision affirmed by the Court of Appeals.

The evidence of record is, however, clear and uncontroverted that Petitioner consistently exhibited poor laboratory knowledge and skills during the first five years in the Graduate Physics Program at Virginia Polytechnic Institute and State University, prior to any contact with Professor Ijaz. Before Dr. Ijaz was involved in any way with Petitioner, other faculty members also expressed doubts about Petitioner's ability and qualifications. After Petitioner had been in the program two years, and three years before Dr. Ijaz was in the picture, a Professor Trower requested that the Graduate Committee terminate Al-Zubaidi's studies. (App. A-9). He found that Petitioner showed precious little understanding of the

most basic physics ideas and was unable to demonstrate any ability to learn even when encouraged to do so. In 1981, five years after Petitioner's admission to the Graduate Program and before Dr. Ijaz was involved in the case, Professor Bowen assessed Petitioner's progress and reported that he and many of his colleagues did not judge that Petitioner's talents are well adapted to physics research. (App. A-11). Petitioner was found to spend far less time in the laboratory than was expected of graduate students. (App. A-9). He was found dangerous to himself and others and his poor skills in using the nuclear reactor required special restrictions on his use of it (App. A-9). This was after Petitioner had been

trying to learn reactor protocol for five years, and before Dr. Ijaz was involved. His first faculty advisor, who resigned after four years of trying to help Petitioner, reported that Petitioner required more help than any other doctoral student the advisor had ever counselled. He found Petitioner poorly qualified for experimental research. (App. A-12).

This was the uncontroverted record of Petitioner. This was the record before Dr. Ijaz became involved in any way. There was no evidence that the members of the faculty were in any way motivated by, let alone knew, Petitioner's religious preference. Also in evidence was testimony from an official at Oak Ridge, Dr. Toth, who was

also a member of the thesis committee, that Petitioner had no competency in computer programs, could not understand various physics concepts, had made little progress and simply became a nuisance to the Oak Ridge staff. There was no evidence that Dr. Toth was in any way retaliating against the Petitioner because of his religion, let alone that Dr. Toth even knew of his religious preference.

Applying the Mt. Healthy evidentiary standard, the District Court found that the evidence overwhelmingly proved that Petitioner would have been dismissed, regardless of Ijaz. Petitioner's record, compiled over the years, dictated this.

2. THERE IS NO CONFLICT WITH OTHER CIRCUITS.

Haimowitz v. Univ. of Nevada, 579 F.2d 526 (9th Cir. 1978) does not conflict with the Opinion of the Fourth Circuit. It is in harmony with this case. Haimowitz was a mixed motive case where summary judgment was granted without the Plaintiff having had the opportunity to show the impact of an advisory committee on a decision. Haimowitz held that a fact question was presented and remanded for development of that testimony. Petitioner was given the opportunity called for in Haimowitz and the District Court and the Appellate Court found that the evidence was lacking to support a finding in his favor. The other cases cited from other Circuits, Bertot v. School District No.

1, Albany County, Wyo., 522 F.2d 1171 (10th Cir. 1975); Gray v. Board of Higher Educ., City of New York, 692 F.2d 901 (2nd Cir. 1982); and Peacock v. Duval, 694 F.2d 644 (9th Cir. 1982) are not in conflict. In Bertot, the decision maker relied solely on a group recommendation, without independent investigation. The present case is so factually dissimilar that Bertot is not applicable. In the instant case, Dr. Gilmer made an independent investigation and also considered Petitioner's lengthy record of poor performance. Gray was an appeal from an interlocutory order concerning discovery matters. The implication was that a committee's input may be proper evidence where one cannot otherwise learn of the group

recommendation, deliberations and reasons for its decisions. Petitioner had available the recommendations of each committee involved as well as access to members for direct or cross examination. Peacock was a summary judgment case akin to Bertot. The opinion held that there were material fact questions to be determined on the First Amendment claim and summary judgment was improper. In the present case, such testimony was presented and considered. The trial court found that Petitioner would have been terminated regardless of Respondent's actions. The Fourth Circuit Court of Appeals affirmed. At the trial of the present case, the full evidentiary record was developed, the decision maker considered

the Petitioner's six year record at the University and in every other way the present case was free of the errors giving rise to Haimowitz, Bertot, Gray, and Peacock. After all the evidence was in, it was clear that Petitioner would have been terminated, regardless of Respondent's activities.

3. THERE IS NO CONFLICT WITH THE DECISIONS OF THIS COURT.

The decision of the Court below is also in complete harmony with Mt. Healthy and Price Waterhouse. These cases were not violated; they are followed by both the trial court and the Fourth Circuit Court of Appeals. Petitioner simply chooses to ignore the entire record of evidence.

The rationale behind the Mt. Healthy "but for" rule in mixed motive cases is that one whose record otherwise qualifies him for dismissal should not be placed in a better position vis a vis retention (as a student) because of the exercise of a constitutional right than he would have occupied had he done nothing. That rationale is appropriate here. Petitioner had established a poor record of experimental research knowledge and skills in the five years before Respondent became his advisor. In his last year, while being advised by the Respondent, that record did not improve, nor did it become worse. The evidence heard and considered by the trial court and reviewed by the appellate court is overwhelming that

Petitioner would have been terminated from the graduate program regardless of Respondent's involvement.

CONCLUSION

Petitioner has shown no conflict among the circuits and has made no viable argument for overruling Mt. Healthy. The evidence supporting the lower court opinions is clear and convincing. Respondent M. A. Ijaz respectfully requests that the Writ of Certiorari be denied.

Respectfully submitted,

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